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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT SEATTLE

8 LAFFECT CAMPBELL, et al.,

9 Plaintiffs,

10 v.

11 OBAYASHI CORP., INC., et al.,

12 Defendant.

CASE NO. C08-181JLR

ORDER

13  
14 **I. INTRODUCTION**

15 This matter comes before the court on Defendant Balfour Beatty Rail, Inc.'s ("BBRI")  
16 motion for summary judgment (Dkt. # 34). Having considered the motion, all responsive  
17 papers, and the arguments made by counsel at oral argument, the court GRANTS the motion  
18 for summary judgment as to Plaintiff Danny Crowder. The court will consider BBRI's  
19 motion with respect to Plaintiffs Duane Jones and Thurmond E. Young, Jr., by separate order.

20 **II. BACKGROUND**

21 Plaintiff Danny Crowder, and others, filed a complaint alleging employment  
22 discrimination on the basis of race (Dkt. # 1) in connection with the construction of light rail  
23 for the Central Puget Sound Regional Transit Authority. The plaintiffs originally filed their  
24 complaint in King County Superior Court. BBRI removed the action to this court. (*See* Dkt.  
25 # 1.) The complaint has been amended three times. The third amended complaint, as well as

1 all earlier complaints, names BBRI as a defendant. (Third Amend. Compl. ("TAC") (Dkt. #  
2 1) ¶ 5.) All of the plaintiffs, who are African American, allege that they were terminated or  
3 forced to quit in violation of the Washington Law Against Discrimination, RCW 49.60.010 *et*  
4 *seq.* ("WLAD"). (TAC ¶ 7.) The third amended complaint alleges: "Danny Crowder was  
5 employed by defendants Sound Transit and Balfour Beatty at the 6th & Royal Brougham  
6 Tunnel site. Mr. Crowder was terminated unlawfully pursuant to RCW 49.60." (TAC ¶ 9.)  
7 Mr. Crowder does not allege a hostile work environment or any other employment  
8 discrimination claim.

9 BBRI moves for summary judgment pursuant to Fed. R. Civ. P. 56(c) as to Mr.  
10 Crowder. (Mot. (Dkt # 34) at 2.) BBRI argues that summary judgment is appropriate  
11 because Mr. Crowder was discharged, along with other construction project employees, due  
12 to construction delays caused by a concrete workers' strike. (Mot. at 7-8.) BBRI asserts that  
13 this is a legitimate, nondiscriminatory reason for terminating Mr. Crowder's employment, and  
14 that Mr. Crowder has not and cannot establish that this reason is a mere pretext for  
15 discrimination. (Mot. at 7.) In response, Mr. Crowder argues that summary judgment is  
16 premature because there exists a question of material fact as to whether BBRI's asserted  
17 reason for discharging Mr. Crowder is a pretext. (Resp. (Dkt. # 37) at 11-12, 14-16). BBRI  
18 disputes these claims. (Reply (Dkt. # 46) at 5-9.)

### 19 III. ANALYSIS

20 Summary judgment is appropriate if the evidence, when viewed in the light most  
21 favorable to the non-moving party, demonstrates that there is no genuine issue of material  
22 fact. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Galen v.*  
23 *County of Los Angeles*, 477 F.3d 652, 658 (9th Cir. 2007). The moving party bears the initial  
24 burden of showing there is no material factual dispute and that he or she is entitled to prevail  
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1 as a matter of law. *Celotex*, 477 U.S. at 323. If the moving party meets this burden, the  
2 nonmoving party must present affirmative evidence to demonstrate specific facts showing that  
3 there is a genuine issue for trial. *Galen*, 477 F.3d at 657. A mere scintilla of evidence  
4 supporting the nonmoving party's position is insufficient to withstand summary judgment.  
5 *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1146 (9th Cir. 2005).

6 **A. Washington Law Against Discrimination**

7 The WLAD prohibits employers from discharging employees on the basis of race. *See*  
8 RCW 49.60.180(2). Washington courts apply the *McDonnell Douglas* burden-shifting  
9 framework to cases brought under the WLAD, and refer to case law interpreting similar  
10 federal employment discrimination statutes as persuasive authority. *Xieng v. Peoples Nat.*  
11 *Bank of Wash.*, 844 P.2d 389, 392 (Wash. 1993); *Grimwood v. Univ. of Puget Sound, Inc.*,  
12 753 P.2d 517, 361-645 (Wash. 1988); *Chen v. Washington*, 937 P.2d 612, 616 (Wash. Ct.  
13 App. 1997); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

14 Under the *McDonnell Douglas* framework, the plaintiff bears the initial burden of  
15 establishing a prima facie case. In order to make out a claim of discriminatory discharge, the  
16 plaintiff must show that he or she (1) belongs in a protected class, (2) was discharged, (3) was  
17 doing satisfactory work, and (4) was replaced by someone not in the protected class. *Chen*,  
18 937 P.2d at 616. If the plaintiff establishes a prima facie case, then the burden shifts to the  
19 employer to articulate a legitimate, nondiscriminatory reason for the termination. *Id.* If the  
20 employer meets its burden of production, the burden returns to the plaintiff to show that the  
21 employer's articulated reasons "are unworthy of belief or are a mere pretext for what is, in  
22 fact, a discriminatory purpose." *Id.* On summary judgment, the plaintiff's final burden is one  
23 of production, not persuasion. *See Jones v. Kitsap County Sanitary Landfill, Inc.*, 803 P.2d  
24 841, 843 (Wash. Ct. App. 1991).

1           **1.       Prima Facie Case**

2           BBRI concedes that Mr. Crowder has established a prima facie case of employment  
3 discrimination under the WLAD for purposes of summary judgment. (Mot. at 6.) As a result,  
4 the court need not inquire at length into the sufficiency of Mr. Crowder's prima facie case. In  
5 brief, Mr. Crowder is African American, i.e., a member of a protected class, he was  
6 discharged by BBRI, he was performing satisfactory work, and he was allegedly replaced by  
7 Eddy Poblete, who is not African American. The court notes that it is not clear that BBRI  
8 actually replaced Mr. Crowder with Mr. Poblete. The evidence suggests that Mr. Poblete had  
9 been employed by BBRI for longer than had Mr. Crowder, although he was new to the Seattle  
10 job site. (*See* Dancer Decl. (Dkt. # 36) ¶ 6.) The parties have presented no evidence  
11 regarding BBRI's policies regarding seniority or layoffs. At oral argument, counsel for BBRI  
12 asserted that Mr. Poblete was more senior than Mr. Crowder as to his employment at BBRI.  
13 For purposes of summary judgment, however, the court will assume that Mr. Poblete replaced  
14 Mr. Crowder within the meaning of the WLAD. Therefore, the court concludes that Mr.  
15 Crowder has met his initial burden. *See Chen*, 937 P.2d at 616.

16           **2.       Legitimate, Nondiscriminatory Reason**

17           In response to Mr. Crowder's prima facie case, BBRI argues that it terminated him  
18 because a concrete workers' strike caused construction delays and eliminated the need for his  
19 position. (Mot. at 6-7; Dancer Decl. ¶¶ 5-7.) In his declaration, Gary Dancer, the project  
20 manager in charge of hiring and firing, states that "Crowder was terminated because of work  
21 delays associated with the concrete workers' strike." (Dancer Decl. ¶ 7.) BBRI states that it  
22 terminated all but four of its employees on the construction team. (Dancer Decl. ¶ 6.) The  
23 remaining employees consisted of "the project foreman, who is Caucasian; a welder who is  
24 Caucasian; an African-American man named Willie Smith; and Eddy Poblete, who is  
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1 Filipino." (Dancer Decl. ¶ 6.) At oral argument, counsel for BBRI stated that, of the four  
2 employees terminated, three were Caucasian and one was African American. BBRI argues  
3 that the concrete workers' strike constitutes a legitimate, nondiscriminatory reason for the  
4 termination. (Mot. at 8.) Additionally, BBRI asserts that the racial composition of the  
5 remaining employees demonstrates that Mr. Crowder was not terminated on the basis of race.  
6 (Mot. at 4.)

7 BBRI has satisfied its burden of production in presenting a legitimate,  
8 nondiscriminatory reason for terminating Mr. Crowder. The delays caused by the concrete  
9 workers' strike represent a legitimate, nondiscriminatory reason for BBRI's decision to  
10 discharge Mr. Crowder. *See Aragon v. Republic Silver State Disposal Inc.*, 292 F.3d 654,  
11 660-61 (9th Cir. 2002) (holding that a seasonal downturn is a legitimate, nondiscriminatory  
12 reason); *Grosz v. Boeing Co.*, 455 F. Supp.2d 1033, 1041 (C.D. Cal. 2006) (holding that a  
13 reduction in force is a legitimate, nondiscriminatory reason). Mr. Dancer's declaration is  
14 sufficient evidence in support of BBRI's asserted reason for the discharge. Furthermore, the  
15 mixed racial composition of BBRI's construction team after the termination of Mr. Crowder's  
16 employment lends some support to BBRI's claim that it was motivated by a legitimate,  
17 nondiscriminatory reason. *Cf. Furnco Const. Corp. v. Waters*, 438 U.S. 567, 580 (1978).  
18 Because BBRI has established a legitimate, nondiscriminatory reason for the discharge, the  
19 presumption of discrimination falls away.

### 20 **3. Pretext**

21 The burden returns to Mr. Crowder to show that BBRI's articulated reason is a pretext  
22 for discrimination. *See Chen*, 937 P.2d at 616. To show that an employer's articulated  
23 reasons are a pretext, the plaintiff may present evidence that "(1) the employer's reasons have  
24 no basis in fact; or (2) even if the reasons are based on fact, the employer was not motivated  
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1 by the reasons; or (3) the reasons are insufficient to motivate the adverse employment  
2 decision." *Chen*, 937 P.2d at 616. The plaintiff need not produce direct evidence of  
3 discrimination or reveal a so-called 'smoking gun.' *See Sellsted v. Washington Mut. Sav.*  
4 *Bank*, 851 P.2d 716, 721 (Wash. Ct. App. 1993). Rather, the plaintiff can meet his or her  
5 burden with circumstantial, indirect, or inferential evidence. *Id.* At a minimum, however, the  
6 plaintiff must establish "specific and material facts to support each element of his or her  
7 prima facie case." *Chen*, 937 P.2d at 616.

8 On summary judgment, the plaintiff must meet his or her burden of production by  
9 demonstrating the existence of an issue of material fact as to whether the employer's  
10 articulated reason is a pretext. *See Jones*, 803 P.2d at 843; *cf. Carle v. McChord Credit*  
11 *Union*, 827 P.2d 1070, 1077 (Wash. Ct. App. 1992). In essence, the "requirement that [the  
12 plaintiff] show that the employer's reason was a pretext simply adds a fifth element to the  
13 prima facie case of discrimination." *Jones*, 803 P.2d at 843. In many cases, "summary  
14 judgment in favor of the employer in discrimination cases is often inappropriate because the  
15 evidence will generally 'contain reasonable but competing inferences of both discrimination  
16 and nondiscrimination' that must be resolved by a jury." *Kuyper v. State*, 904 P.2d 793, 797  
17 (Wash. Ct. App. 1995) (*citing Carle*, 827 P.2d at 1077). Nonetheless, a plaintiff must show  
18 "a nexus between her evidence and an adverse employment action" in order to raise an issue  
19 as to pretext. *Kuyper*, 904 P.2d at 797. If a plaintiff "has produced no evidence from which a  
20 reasonable jury could infer that an employer's decision was motivated by an intent to  
21 discriminate, summary judgment is entirely proper." *Id.*

22 Mr. Crowder submits two declarations: his own declaration (Dkt. # 44) and the  
23 declaration of Alan Harris, a Caucasian co-worker (Dkt. # 43). In Mr. Crowder's declaration,  
24 he states: (1) his Caucasian co-workers excluded him (Crowder Decl. ¶¶ 5, 6); (2) his  
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1 foreperson called him derogatory names, including “boy” and “faggot,” and yelled at him on a  
2 regular basis (Crowder Decl. ¶¶ 8, 9, 10); (3) his Caucasian co-workers called him names like  
3 “pussy fuck” (Crowder Decl. ¶ 12); (4) his Caucasian co-workers used the term “nigger” in  
4 his presence, although not in referring to him (Crowder Decl. ¶ 15); and (5) his replacement,  
5 Mr. Poblete, appeared to have “no experience” and had to be trained by Mr. Crowder  
6 (Crowder Decl. ¶ 17). Similarly, in Mr. Harris’ declaration, Mr. Harris states: (1) there was  
7 “racial tension” on the job site (Harris Decl. ¶¶ 8, 9); (2) the foreperson asked him whether he  
8 was a “nigger lover” after learning that Mr. Harris had given Mr. Crowder a ride to work  
9 (Harris Decl. ¶ 20); (3) Mr. Dancer’s “response was to just laugh” when Mr. Harris reported  
10 that the foreperson was racist (Harris Decl. ¶ 21); (4) Mr. Crowder’s replacement was “not  
11 experienced” and “looked white” (Harris Decl. ¶ 22, 23); (5) the concrete workers’ strike  
12 slowed work but “there was still work to do” (Harris Decl. ¶ 26); and (6) the foreperson  
13 referred to Mr. Crowder as a “nigger” when Mr. Harris went to pick up his final check (Harris  
14 Decl. ¶ 27). Neither declaration states that Mr. Dancer was at the construction site on a  
15 regular basis or that he observed any of the alleged discriminatory behavior of Mr. Crowder’s  
16 foreperson or co-workers.

17 Viewed in the light most favorable to Mr. Crowder, the evidence is insufficient to  
18 show the existence of an issue of a material fact as to whether BBRI’s articulated reason for  
19 discharging Mr. Crowder is a pretext. Specifically, Mr. Crowder has failed to establish a  
20 nexus between the alleged discriminatory treatment by his foreperson and co-workers and  
21 BBRI’s decision to terminate his employment. *See Kuyper*, 904 P.2d at 797.

22 As a preliminary consideration, Mr. Crowder acknowledges the fact of the concrete  
23 workers’ strike and that it caused delays to the construction project. (Resp. at 16; *see* Harris  
24 Decl. ¶ 26.) He presents evidence, however, that there was “still work to do.” (Harris Decl. ¶  
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26.) BBRI confirms Mr. Harris' assertion that the concrete workers' strike did not halt all work because BBRI retained four employees, including a new employee to the construction project who had arrived after Mr. Crowder and Mr. Harris were hired, while discharging four other employees. (Dancer Decl. ¶ 4.) In theory, it appears that BBRI could have retained Mr. Crowder instead of Mr. Poblete. Without more, the fact that BBRI chose to discharge Mr. Crowder, along with three other employees, instead of Mr. Poblete is insufficient to rebut BBRI's articulated legitimate, nondiscriminatory reason for the discharge.

Mr. Crowder attempts to meet his burden of production with evidence that his foreperson and co-workers treated him in a hostile and racist manner. The declarations of Mr. Crowder and Mr. Harris are sufficient to establish for purposes of summary judgment that Mr. Crowder's foreperson and co-workers excluded him and used racial epithets and other offensive terms. This evidence raises substantial questions as to the conduct of Mr. Crowder's foreperson and his co-workers, but it does not touch on the issue of whether BBRI, through the actions of its decision-maker, Mr. Dancer, was motivated by discriminatory intent when it discharged Mr. Crowder. Mr. Crowder does not allege that his foreperson or his co-workers had any control or influence over the decision-making process.

The only alleged connection between Mr. Dancer and the discriminatory actions of Mr. Crowder's foreperson and co-workers is Mr. Harris' statement that he told Mr. Dancer that the foreperson was racist and Mr. Dancer's response "was to just laugh." (Harris Decl. ¶ 21.) Assuming Mr. Harris' recollection is accurate, this evidence is too attenuated to raise an issue of material fact as to whether Mr. Dancer acted with discriminatory intent. Mr. Crowder does not present any evidence to suggest that Mr. Dancer participated in any discriminatory behavior or was present when the incidents took place. The burden of production rests with Mr. Crowder to show specific and material facts to suggest pretext. At

1 most, Mr. Crowder has demonstrated a potentially hostile working environment, not that his  
2 discharge was motivated by discriminatory animus. This generalized showing, even if taken  
3 as true, cannot substitute for a showing of pretext when there is no connection between the  
4 indignities suffered by Mr. Crowder and the decision-making process that resulted in his  
5 discharge.

6 Furthermore, Mr. Crowder does not contest that BBRI discharged three other  
7 employees at the same time and for the same articulated reason that it discharged him.  
8 (Dancer Decl. ¶¶ 4, 6.) The court notes that there appears to be some confusion or error in  
9 the record regarding the racial composition of the original eight-member construction team.  
10 Mr. Dancer states that Mr. Crowder joined a group of employees, including "two other  
11 African American men" when hired (Dancer Decl. ¶ 4), while Mr. Crowder states that there  
12 was only one other African American employee (Crowder Decl. ¶¶ 7, 13). In its pleadings,  
13 BBRI asserts that Mr. Crowder "was the only African American laid off," and states that only  
14 a single African American employee remained after the layoffs. (Reply at 5-6.) At oral  
15 argument, counsel for BBRI confirmed that BBRI discharged three Caucasian workers in  
16 addition to Mr. Crowder. In any event, the fact that similarly situated workers, including  
17 either two or three non-African American employees, were discharged by BBRI at the same  
18 time as Mr. Crowder and for the same asserted reason functions to cut against a showing of  
19 pretext. *See Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1094 (9th Cir. 2001).  
20 Similarly, the fact that the resulting four-person workforce included Mr. Smith, an African  
21 American employee, diminishes any showing of pretext.

22 The parties dispute Mr. Poblete's level of experience. Mr. Dancer states that Mr.  
23 Poblete was an "extremely experienced railroader" who was brought in from another BBRI  
24 project (Dancer Decl. ¶ 6), while Mr. Crowder describes him as having "no experience"

1 (Crowder Decl. ¶ 17) and Mr. Harris states that he "was definitely not experienced" (Harris  
2 Decl. ¶ 23). An employer's decision to discharge an employee whose qualifications were  
3 clearly superior to an employee not discharged may be evidence of pretext. *Cf. Odima v.*  
4 *Westin Tucson Hotel*, 53 F.3d 1484, 1492 (9th Cir. 1995). However, an employee's  
5 subjective opinions as to competence do not raise a genuine issue of material fact. *Cf.*  
6 *Bradley v. Harcourt, Brace and Co.*, 104 F.3d 267, 270 (9th Cir. 1996). Mr. Crowder's and  
7 Mr. Harris' assertions regarding Mr. Poblete's level of experience are subjective opinions  
8 with no foundation in Mr. Poblete's actual employment history or experience level. These  
9 opinions do not give rise to a genuine issue of material fact.

10 At oral argument, counsel for Mr. Crowder argued that the totality of the  
11 circumstances at the BBRI construction site gives rise to the inference that Mr. Dancer was  
12 aware of the alleged discriminatory treatment and thus that a genuine question of fact arises  
13 as to whether he was motivated by discriminatory intent when he discharged Mr. Crowder.  
14 The court acknowledges its responsibility to consider the evidence as a whole instead of in  
15 individual parts. Nonetheless, the court must analyze the evidence as it pertains to specific  
16 legal issues. A plaintiff may not survive summary judgment on a discriminatory discharge  
17 claim after the defendant has met its burden in establishing a legitimate, nondiscriminatory  
18 reason by showing that a genuine issue of material fact exists as to whether generalized acts  
19 of discrimination took place at the job site. Mr. Crowder has presented insufficient evidence  
20 to connect Mr. Dancer to the alleged discriminatory acts at the construction site.

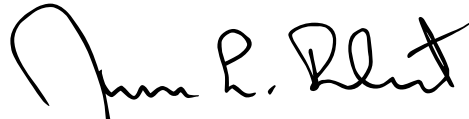
21 On the whole, Mr. Crowder has not satisfied his burden of production in  
22 demonstrating a genuine issue of material fact as to pretext. Although the court recognizes  
23 the severity of the alleged hardships suffered by Mr. Crowder, the evidence presented by Mr.  
24 Crowder fails to allege a sufficient nexus between Mr. Dancer's decision to terminate Mr.  
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1 Crowder's employment and a discriminatory intent. As a result, the court concludes that  
2 summary judgment, pursuant to Fed. R. Civ. P. 56(c), is appropriate.

3 **IV. CONCLUSION**

4 For the reasons stated above, the court GRANTS the motion for summary judgment as  
5 to Plaintiff Danny Crowder.

6 Dated this 24th day of November, 2008.

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9 JAMES L. ROBART  
United States District Judge